Volume 83
Issue 3 *Dickinson Law Review - Volume 83, 1978-1979*

3-1-1979

The Defensive Use of Collateral Estoppel in Multidistrict Litigation After Parklane

Alan J. Statman

The Defensive Use of Collateral Estoppel in Multidistrict Litigation After *Parklane*

Alan J. Statman*

I. Introduction

In the recent case of *Parklane Hosiery Co. v. Shore,*[1] the Supreme Court held that offensive use of collateral estoppel — whereby a plaintiff seeks "to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff"—[2] may be appropriate when a trial court in its discretion finds that application of the doctrine would be fair. Aside from the profound effect this ruling has on the emerging doctrine of offensive collateral estoppel, *Parklane* has broader implications on the standards for applying defensive collateral estoppel when mutuality of parties is lacking. The Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[3] left to "the trial courts' sense of justice and equity" the formula for applying this doctrine, which estops a plaintiff "from asserting a claim that the plaintiff had previously litigated and lost against another defendant."[4] *Parklane* offers considerable guidance in determining what factors weigh in making a "just and equitable" decision in the use of defensive collateral estoppel when no mutuality is present.[5]

---

* B.S. 1975, Oregon State University; J.D. 1978, Syracuse University School of Law; Member of Florida Bar; Law Clerk to the United States District Court, S.D. Fla.

The conclusions expressed in this article are those of the author and are not, nor are they intended to be, the views of the court.

1. 99 S. Ct. 645 (1979).
2. *Id.* at 650.
3. 402 U.S. 313 (1971).
4. *Id.* at 334.
5. In discarding the mutuality rule for patent infringement actions, the Court in *Blonder-Tongue* overruled the earlier case of Triplett v. Lowell, 297 U.S. 638 (1936), stating,

> We are not persuaded, therefore that the *Triplett* rule as it was formulated, is essential to effectuate the purposes of the patent system or is an indispensible or even an effective safeguard against faulty trials and judgments. Whatever legitimate concern

In a multidistrict litigation setting, a transferee judge sitting for consolidated pretrial proceedings pursuant to a section 1407 transfer[6] by the Judicial Panel on Multidistrict Litigation,[7] may now be able to hear consolidated cases on the merits in situations in which he was previously unable. Ordinarily, if a transferee judge presiding over such consolidated pretrial proceedings wanted to hear consolidated cases on the merits, he would have to be located in a district where the cases "might have been brought" before he could transfer venue under section 1404(a).[8] In the common single plaintiff-multiple defendant complex lawsuit, however, there is often no one proper forum to which all the cases can be transferred under that section for consolidated trial on the merits. Moreover, defendants are not encouraged to consolidate voluntarily because they can adopt a "wait and see" approach: since the defendants were not all parties to a single action, due process prevents the plaintiff from asserting collateral estoppel against them in their ongoing separate litigation.[9] Yet,

---

there may be about the intricacies of some patent suits, it is insufficient in and of itself to justify patentees relitigating validity issues as long as new defendants are available. This is especially true if the court in the second litigation must decide in a principled way whether or not it is just and equitable to allow the plea of estoppel in the case before it.

Id. at 334.

6. 28 U.S.C. § 1407(a) (1976) provides, in pertinent part, as follows:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

The remaining subsections of the statute deal with procedural matters, rule-making authority for the panel and limitations on the types of cases that may be transferred.

7. For a historical overview and analysis of the workings of the Panel, see Cahn, *A Look at the Judicial Panel on Multidistrict Litigation,* 72 F.R.D. 211 (1976).

8. 28 U.S.C. § 1404(a) (1976) provides, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Although it is true that a transferee judge must be located in a district or division where the action might have been brought originally before he can transfer venue of the case to his court under § 1404(a), a transferee judge can avoid the hardships of § 1404(a) by being assigned or designated, pursuant to 28 U.S.C. § 292 (1976), to a district or division where venue is proper. The importance of a § 292 designation in multidistrict litigation is discussed in the text accompanying notes 104-106 *infra.*

9. In *Blonder-Tongue,* Justice White speaking for a unanimous court, reiterated the requirements of due process as they apply to collateral estoppel:

Some litigants - they who never appeared in a prior action - may not be collaterally estopped without litigating the issue. They have never had the chance to present their evidence and arguments in the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

402 U.S. at 329. The Court also notes this in Parklane Hosiery Co. v. Shore, 99 S. Ct. at 649 n.7.

defensive collateral estoppel theoretically would be available against the opposing plaintiff under *Blonder-Tongue*, if he failed to prevail on the merits against any of the defendants. After *Parklane,* however, defensive collateral estoppel may not always be available to defendants who "wait and see" instead of joining the original suit. In certain complex multidistrict cases, the use of the doctrine may undermine the basic policy reasons for allowing collateral estoppel as expressed by the Court in *Parklane.* The refusal of a transferee or transferor court to allow the assertion of collateral estoppel in a subsequent action may, in effect, encourage the defendants to consolidate before the transferee judge, through the device of a declaratory judgment action, for a trial on the merits. This procedure would allow a court to avoid the problems of waste of judicial resources and unfairness that the Court in *Parklane* declared as the central underlying policy for application of the doctrine.[10]

Whether the practice of a section 1407 judge transferring the cases to himself is a sound one has been widely debated.[11] Arguably, certain considerations might mitigate against this practice, yet the massive nature of many multidistrict cases makes consolidation for trial on the merits peculiarly appealing in many instances.[12] The *Parklane* decision may present a judge another tool for effectuating such a consolidated proceeding in a situation in which he was heretofore unable because proper section 1404(a) venue was unavailable.

II. *Parklane*: Culmination of a Trend Away from Mutuality

The *Parklane* case should be viewed as the final step in a trend away from the common-law rule requiring mutuality of parties for the application of collateral estoppel. Traditionally, the rule required both identical issues and parties,[13] or those in privity with them,[14] before the defensive use of collateral estoppel could be as-

10. Parklane Hosiery Co. v. Shore, 99 S. Ct. 645, 650 (1979).

11. *See* Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971); C. WRIGHT, A. MILLER & E. COOPER, 15 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §§ 3866-3867 (1976) [hereinafter referred to as C. WRIGHT], Speiser, *Multidistrict Litigation in Air Crash Cases*, CASE & COMMENT (July-Aug. 1974); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation,* 87 HARV. L. REV. 1001, 1017-28 (1974); Comment, *Consideration of Pre-trial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review,* 33 U. CHI. L. REV. 558, 561 (1966).

12. This problem is discussed in Part III(C) *infra.*

13. The leading case in support of the traditional rule is Bigelow v. Old Dominion Copper Min. & Smelting Co., 225 U.S. 111, 127 (1912), in which the Court stated, "It is a principal of general elementary law that the estoppel of a judgment must be mutual." Later in that opinion, the Supreme Court restated the rule: "There can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties." *Id.* at 131.

14. The Court in *Bigelow* also recognized that the rule applied to those in privity. *Id.* at 128-29. The *Bigelow* case is cited in a footnote by the Court in Parklane Hosiery Co. v. Shore, 99 S. Ct. 645, 649 n. 6 (1979). *Restatement (First) of Judgments,* § 93, comment d (1942), sup-

serted.[15] Once these two elements were present, and a final adjudication on the merits entered, the Court embarked on a second level of analysis: the person against whom estoppel was asserted had to show that he did not have a "full and fair opportunity" to pursue his claim in the first action.[16]

The leading case abrogating the mutuality requirement was *Bernhard v. Bank of America National Trust & Savings Association.*[17] The Supreme Court of California, in a sweeping opinion by Justice Traynor, cast aside the traditional rule with the following oft-quoted statement:

> No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend.[18]

---

ports this rule. For a complete discussion of the traditional rule, see *Annot.,* 31 A.L.R.3d 1044, 1059 (1970).

15. Courts have distinguished between offensive and defensive collateral estoppel in applying the mutuality requirement. Many courts that have accepted the abandonment of mutuality for defensive collateral estoppel have been reluctant to embrace such a rule for offensive collateral estoppel. *See* the discussion in Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969), in which the Supreme Court of Kansas noted that despite the broad language of Justice Traynor in Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942),

> In actual practice . . . , it for the most part has been used *defensively* by one not a party to the first action against one who was a party to the first action and had his day in court upon the issues which the judgment decided, rather than applied affirmatively . . . in favor of a nonparty to the previous litigation . . . .

Id. at —, 449 P.2d at 540 (emphasis in original). The court in *Adamson* refused to abandon the mutuality rule in that case. Various cases are collected in Annot., 31 A.L.R.3d 1044, 1068 (1970).

The distinction between the requirement of mutuality in offensive use of collateral estoppel and defensive use of collateral estoppel was extensively discussed by the Court in *Parklane.* 99 S. Ct. at 650-51. These distinctions are analyzed in Part IV *infra.*

16. In Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 333 (1971), the Court indicated that an onerous burden existed on the patentee to prove "that the prior proceedings were seriously defective." *Id.* at 333. For a discussion of the "full and fair opportunity" litigation requirement, see Kaiser Indus. Corp. v. Jones & Laughlin Steel Corp., 515 F.2d 964 (5th Cir. 1975). The court in *Kaiser* found that such an opportunity existed in the prior action, and that collateral estoppel properly should have been applied. *Id.* at 987. The court significantly stated that the words "justice and equity" used by the Court in *Blonder-Tongue* were not "independent grounds" for denying the use of collateral estoppel, "and that a determination whether such independent ground exists" did not rest in the trial court's discretion:

> The phrase indicates that each case merits individual consideration before a district court rules on an estoppel plea and, possibly, that other extraordinary grounds, not expressly mentioned, may provide the necessary foundation for denying a collateral estoppel defense in individual cases.
>
> . . . We cannot acquiesce to a meaning of the words, "justice and equity" that would permit unarticulated and unreviewable determinations when a district court refuses a plea of collateral estoppel in patent litigation.

515 F.2d at 978. *See also* Kearney & Trecker Corp. v. Cincinnati Milacron Inc., 403 F. Supp. 1040 (S.D. Ohio 1975), *aff'd,* 562 F.2d 365 (6th Cir. 1977).

17. 19 Cal. 2d 807, 122 P.2d 892 (1942).

18. *Id.* at 812, 122 P.2d at 895. This statement was cited by the Supreme Court in *Parklane,* 99 S. Ct. at 649 n. 8. For a discussion of the historical and practical significance of the *Bernhard* case, see Currie, *Civil Procedure: The Tempest Brews,* 53 CALIF. L. REV. 25 (1965) (wherein Professor Currie reassessed his earlier reservations with the *Bernhard* doctrine and its

Many state and lower federal courts followed the *Bernhard* rationale and abandoned the mutuality principle in the use of offensive,[19] as well as defensive, collateral estoppel.[20] The Supreme Court, however, was silent until *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,*[21] decided in 1971. In abandoning the mutuality requirement where a patentee sought to relitigate the validity of a patent already declared invalid by another court in a previous action, the majority in *Blonder-Tongue* overruled the case of *Triplett v. Lowell,*[22] which had stood for nearly thirty-five years.

While directing his initial discussion to the general trend away from the mutuality rule, Justice White, speaking for the majority, clearly tempered his remarks by stating,

> These mutations in estoppel doctrine are not before us for wholesale approval or rejection. But at the very least they counsel us to re-examine whether mutuality of estoppel is a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid.[23]

Despite the Court's disclaimer, however, the general tenor of the opinion was interpreted broadly.[24] When lower courts read Justice White's broad language relating to "a trial court's sense of justice and equity"[25] in conjunction with Jeremy Bentham's description of the doctrine as "destitute of any semblance of reason"[26] and as "a maxim which one would supposed to have found its way from the gaming table to the bench,"[27] they interpreted *Blonder-Tongue* as

---

progeny); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281 (1957); and *Annot.*, 31 A.L.R.3d 1044, 1069-70 (1970).

19. *See, e.g.,* Zdanok v. Glidden Co., Durkee Famous Food Div., 327 F.2d 944 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967); and the cases collected at *Annot.*, 31 A.L.R.3d 1044, 1074 (1970).

20. *See, e.g.,* Davis v. McKinnon & Mooney, 266 F.2d 870 (6th Cir. 1959); and the cases collected at *Annot.*, 31 A.L.R.3d 1044, 1072 (1970).

21. 402 U.S. 313 (1971).

22. 297 U.S. 638 (1936).

23. 402 U.S. at 327.

24. *See, e.g.,* North Carolina v. Charles Pfizer & Co., 537 F.2d 67, 73 (4th Cir. 1976):

> Since the validity *vel non* of the Conover patent was not directly in issue in the proceedings before the Commission or in the court below, the precise wording of *Blonder-Tongue* is not dispositive of the question raised by the plaintiff's motion. This is of little moment, however, since the plaintiff's motion should properly be considered in the light of the fundamental changes and developments in the doctrine of collateral estoppel which were thoroughly reviewed and analyzed by Mr. Justice White in his opinion in *Blonder-Tongue.*

Id.

In Poster Exchange, Inc. v. National Screen Serv. Corp., 517 F.2d 117, 122 (5th Cir. 1975), the court in an antitrust action found the use of collateral estoppel appropriate in that case, and citing *Blonder-Tongue,* stated that the trend in abrogating the mutuality requirement "has been smiled upon by the Supreme Court."

25. 402 U.S. at 334.

26. 3 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 519 (1827) reprinted in 7 WORKS OF JEREMY BENTHAM 171 (J. Bowring ed. 1843) quoted at 402 U.S. at 323. This quote was also noted by Judge Friendly in Zdanok v. Gliddon Co., Durkee Famous Food Div., 327 F.2d 944, 954 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964).

27. 3 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 519 (1827) reprinted in 7 WORKS OF JEREMY BENTHAM 171 (J. Bowring ed. 1843) quoted at 402 U.S. at 334.

having wider applicability than just to patent validity actions.[28]

Then in *Parklane* the Supreme Court allowed the use of offensive collateral estoppel when to do so would be fair, and left the decision to a trial court's "broad discretion."[29] In distinguishing between defensive and offensive collateral estoppel, the Court cited the underlying policy considerations that make defensive use of the doctrine generally appropriate, when offensive use is not. Defensive use "precludes a plaintiff from relitigating identical issues," but offensive use encourages a " 'wait and see' attitude in the hope that the first action by another plaintiff will result in a favorable judgment."[30] Thus, defensive use decreases the amount of litigation, whereas offensive use is likely to increase it.[31] Moreover, offensive use may be unfair to the defendant. If the first suit is for nominal damages, the defendant "may have little incentive to defend vigorously, particularly if future suits are not foreseeable."[32] Application of the doctrine would also be unfair if the judgment relied on as a basis for estopping the defendant is "inconsistent with one or more previous judgments,"[33] or if the "second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result."[34]

Thus, the Court concluded that trial courts should be given "broad discretion to determine when [the doctrine] should be applied."[35] The Court stated the general rule of fairness in the grant or denial of collateral estoppel as follows:

> The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.[36]

An 8-1 majority for the Court went on to find none of these negative factors present in *Parklane,* and held the "contemporary law" of collateral estoppel led "inescapably" to its application there.[37] The Court's equation of the policy reasons supporting either

---

28. North Carolina v. Charles Pfizer & Co., 537 F.2d 67 (4th Cir. 1976); Poster Exchange Inc. v. National Screen Serv. Corp., 517 F.2d 117 (5th Cir. 1975); *In re* Piper Aircraft Distrib. Sys. Antitrust Litigation, 411 F. Supp. 115 (W.D. Mo. 1976); *see* note 22 *supra.*

29. 99 S. Ct. 645, 651 (1979).

30. *Id.* at 650-51.

31. *Id.*

32. *Id.* at 651.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* In a footnote, Justice Stewart noted that this was the approach of the *Restatement, (Second) of Judgments,* (Tentative Draft No. 2, 1975) § 88, which states that the present trend, " 'if not the clear weight of recent authority, is to the effect that there is no intrinsic difference between 'offensive' as distinct from 'defensive' issue preclusion . . . .' Reporter's Note at 99." 99 S. Ct. at 651 n. 16.

37. 99 S. Ct. at 652.

the grant or denial of offensive and defensive collateral estoppel, however, may have important ramifications. A complex multidistrict lawsuit may present a situation in which policy reasons would preclude the use of defensive collateral estoppel, and denial would both promote judicial economy and avoid the potential unfairness the Court alluded to in *Parklane.*[38]

III. Use of the Venue Statute to Permit the Transferee Judge to Hear a Consolidated Trial on the Merits in Complex Multidistrict Cases

A. Limitations Inherent in the Section 1404(a) Venue Statute

Since section 1404(a) permits transfer of an action only to a district "where it might have been brought,"[39] transfer to the most convenient forum is often precluded. For example, transfer is denied if venue would have been improper in the district or division originally. The restrictive effect of this statute was strengthened by the Supreme Court in *Hoffman v. Blaski,*[40] in which the Court held that consent of the defendant was ineffective if an independent right of plaintiff to file in that district did not exist.[41] This decision was highly criticized at the time of its rendering,[42] but lower courts continue to follow it.[43]

Although the general procedure for a section 1404(a) transfer is by party motion,[44] a court may order a transfer on its own initiative,[45] subject to certain requirements of notice and hearing.[46] Like-

---

38. These policy considerations are discussed more fully in Part IV *infra.*

39. 28 U.S.C. § 1404(a) (1976). *See* note 8 *supra.*

40. 363 U.S. 335 (1960).

41. In an opinion by Justice Whittaker, the Court held that the language of § 1404(a) was clear and unambiguous:

> We do not think the § 1404(a) phrase "where it might have been brought" can be interpreted to mean, as petitioners theory would require, "where it may now be rebrought, with the defendants' consent." This Court has said, in a different context, that § 1404(a) is "unambiguous, direct [and] clear," . . . and that "the unequivocal words of § 1404(a) and the legislative history . . . [establish] that Congress indeed meant what it said."

363 U.S. at 342-43.

42. *See* Korbel, *The Law of Federal Venue and Choice of the Most Convenient Forum,* 15 RUTGERS L. REV. 607 (1961); Masington, *Venue in the Federal Courts - The Problem of the Inconvenient Forum,* 15 U. MIAMI L. REV. 237 (1961).

43. *See, e.g.,* American Oil Co. v. McMullin, 433 F.2d 1091 (10th Cir. 1970); Shutte v. Armco Steel Corp., 431 F.2d 22 (3d Cir. 1970), *cert. denied,* 401 U.S. 910 (1971); Northwest Animal Hosp., Inc. v. Earnhardt, 452 F. Supp. 191 (W.D. Okla. 1977); Siemens Aktiengesellshaft v. Sonotone Corp., 370 F. Supp. 970 (N.D. Ill. 1973).

44. Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (3d Cir. 1962); *see* the discussion in C. WRIGHT, *supra* note 11, at § 3844.

45. I-T-E Circuit Breaker Co. v. Becker, 343 F.2d 361, 363 (8th Cir. 1965); Goldlawr, Inc. v. Heiman, 288 F.2d 579 (2d Cir. 1961), *rev'd on other grounds,* 369 U.S. 463 (1962); Watwood v. Barber, 70 F.R.D. 1, 9 (N.D. Ga. 1975); Stanley Works v. Globemaster, Inc., 400 F. Supp. 1325, 1338 (D. Mass. 1975) ("the language of the statute leaves little doubt that it allows transfer on the court's own motion anytime the court determines it is convenient or just for it to do so"); Janus v. J.M. Barbe Co., 57 F.R.D. 539 (N.D. Ohio 1972); Kearney & Trecker Corp. v.

wise, Rule 11(b) of *Rules of the Procedure of the Panel on Multidistrict Litigation*[47] provides that a transferee court may order a transfer of an action on its own initiative:

> Each transferred action that has not been terminated in the transferee court shall be remanded to the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.[48]

The limitation inherent in the venue statute makes it less useful than it might have been, and creates an anomalous problem in the multidistrict litigation setting.[49] Fortunately, the drafters of section 1407 avoided this problem as it concerns pretrial transfers.

B. Problems of Jurisdiction and Power Under Section 1407

The Congress enacted 28 U.S.C. section 1407, which created the Judicial Panel on Multidistrict Litigation in 1968, in response to an increasing burden upon the federal judiciary over the previous twenty-five years.[50] The statute authorizes the transfer of "civil actions involving one or more common questions of fact . . . pending in different districts" to a single district for consolidated pretrial proceedings.[51] Unlike the section 1404(a) venue statute, section 1407 does not limit transfer for pretrial proceedings to a place "where the action might have been brought." The Panel, in choosing a proper forum, is authorized to consider the convenience of witnesses, parties, and the object of promoting "just and efficient conduct of such actions."[52]

The original purpose of the statute was to permit consolidation of civil actions for pretrial proceedings only. As a practical matter, however, the result has often been consolidation of the transferred cases for trial on the merits. Although this practice is presently sanc-

---

Cincinnati Milling Mach. Co., 254 F. Supp. 130 (N.D. Ill. 1966); *See also* C. WRIGHT, *supra* note 11, at § 3844.

46. Starnes v. McGuire, 512 F.2d 918, 934 (D.C. Cir. 1974); Plum Tree, Inc. v. Stockment, 488 F.2d 754, 756 (3d Cir. 1973); Fine v. McGuire, 433 F.2d 499 (D.C. Cir. 1970); C. WRIGHT, *supra* note 11, at § 3844.

47. *Rules of Procedure of the Judicial Panel on Multidistrict Litigation,* 11, effective August 1, 1978 (found at 78 F.R.D. 561 (1978)).

48. *Id.* 28 U.S.C. § 1406 (1976) states in pertinent part,

> § 1406 Cure or Waiver of Defects
>
> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
>
> (b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

49. *See* Part III(B) *infra.*

50. *See* C. WRIGHT, *supra* note 11, at § 3861, which traces the prehistory of the Panel, and the promulgation of § 1407. A brief history is also found in Cahn, *A Look at the Judicial Panel on Multidistrict Litigation,* 72 F.R.D. 211 (1976).

51. *See* note 6 *supra.*

52. *Id.*

tioned by the *Rules of Procedure* of the Panel,[53] this was not always the case. It was believed that section 1407 precluded a section 1404(a) transfer for consolidated trial on the merits because the statute required remand of the cases at the close of the pretrial procedures. As one commentator suggested, "[U]nless Congress rewords the provision, the general pretrial powers of the transferee court will probably be limited by the absence of the ability to transfer."[54] Nevertheless, Judge Lord held otherwise in an excellent opinion in which he concluded that section 1407 limited only the power of the Panel and not the transferee judge:

> Thus, if the *transferee judge* cannot make a Section 1404(a), or an even more critical Section 1406(a) transfer, no court can and both Sections 1404(a) and 1406(a) will have been temporarily suspended by Section 1407. That surely cannot have been the intent of Congress.[55]

Indeed, language in the Committee Report of the House Bill indicated that a section 1404(a) transfer was at least contemplated,[56] and it is now a well-accepted principle often endorsed and encouraged by the Panel.[57]

In many instances section 1407 transfers have been made to forums where the cases could be more easily consolidated for trial.[58] A good example of this was the original transfer by the Panel in *In re Yarn Processing Patent Validity Litigation,*[59] in which strong policy

---

53. *See* notes 47-48 and accompanying text *supra.*

54. Note, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review,* 33 U. CHI. L. REV. 558, 562 (1966).

55. *In re* Antibiotic Antitrust Actions, 333 F. Supp. 299 (S.D.N.Y. 1971).

56. In the Sectional Analysis of H.R. 1130 the House Committee states, "Of course, 28 U.S.C. 1404, providing for change of venue generally, is available in those instances where transfer of a case for all purposes is desirable." H.R. No. 1130, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1902.

57. The increasing role of the Panel and its evolving practice of transferring cases under § 1407 to forums appropriate for trial is discussed in Note, *The Judicial Panel and the Conduct of Multidistrict Litigation,* 87 HARV. L. REV. 1001, 1023 (1974).

58. *See, e.g., In re* Yarn Processing Patent Validity Litigation, 341 F. Supp. 376 (J.P.M.D.L. 1972); *In re* Silver Bridge Disaster Litigation, 311 F. Supp. 1345 (J.P.M.D.L. 1970); *In re* Mid-Air Collision near Fairland, Ind., 309 F. Supp. 621, 623 n.6 (J.P.M.D.L. 1970); *In re* Koratron Patent Litigation, 302 F. Supp. 239, 242 (J.P.M.D.L. 1969); *In re* Grain Shipments, 300 F. Supp. 1402, 1404 (J.P.M.D.L. 1969), discussed in Note, *The Judicial Panel and the Conduct of Multidistrict Litigation,* 87 HARV. L. REV. 1001, 1023-24 (1974).

The Panel stated in *In re* Master Key, 320 F. Supp. 1404, 1406 (J.P.M.D.L. 1971) that "[w]here transfer under § 1407 is preceded by transfer of some cases under 1404(a), the district selected by the transferor judge or judges and the reasons given therefor are entitled to great weight in selecting the most appropriate district for the transfer of the remaining actions under § 1407." *See generally* Judge Lord's learned discussion in *In re* Antibiotic Antitrust Action, 333 F. Supp. 299, 306 (S.D.N.Y. 1971); Note, *Consolidation and Transfer in the Federal Courts; 28 U.S.C. Section 1404(a),* 22 HASTINGS L.J.1289 (1971); Comment, *A Survey of Federal Multidistrict Litigation - 28 U.S.C. § 1407,* 15 U. VILL. L. REV. 916, 925-26 (1969).

59. 341 F. Supp. 376 (J.P.M.D.L. 1972). This case has a fascinating procedural history. *See In re* Yarn Processing Patent Validity Litigation, 541 F.2d 1127 (5th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977); *In re* Yarn Processing Patent Validity Litigation, 498 F.2d 271 (5th Cir.), *cert. denied,* 419 U.S. 1057 (1974). The procedural aspects of the case are discussed further at notes 101 &103 *infra.*

reasons mitigated for transfer to the Eastern District of New York, yet a 4-3 majority of the Panel transferred the cases to the Southern District of Florida. Central to the majority's reasoning was "that Sections 1404(a) and 1407 may be used together to achieve the just and efficient processing of litigation."[60] The majority of the Panel was "convinced that of the two proposed districts, the Southern District of Florida is better suited to pretrial and ultimate trial of the principal issues involved in the litigation."[61] The Panel concluded that in light "of the doctrine of collateral estoppel applicable in patent validity actions (under *Blonder-Tongue* . . .), it is peculiarly desirable that in such multidistrict patent litigation the transfer under [section] 1407 for pretrial proceedings be made to a district in which full pretrial and trial [proceedings] . . . can be completed . . . ."[62]

C. The Advisability of § 1404(a) Transfers in Multidistrict Cases

Certain considerations may strongly mitigate against a section 1407 judge transferring the case to himself for adjudication on the merits. It has been argued that transferee courts apply different standards on a section 1404(a) motion than do original courts, "frequently subordinating notions of party and witness convenience to considerations of judicial economy."[63] As a result, the section 1404(a) policy of advancing party and witness convenience will have little value when weighed against the section 1407 policy concern of judicial economy.[64]

It has also been stated that if consolidation for trial is an advisa-

---

60. 341 F. Supp. at 381.

61. *Id.* at 382.

62. *Id.* at 383 (citation omitted). The majority recognized that certain of the actions were not transferrable to the Southern District of Florida under 28 U.S.C. § 1404(a). "Nevertheless, all issues raised in these suits, as well as many of the parties, are present in other actions and can be conclusively determined by pretrial and trial in Florida." 341 F. Supp. at 382 n.15.

The three dissenters argued that because of the convenience of parties and attorneys, as well as the extensive discovery already carried out, New York was the desirable forum. *Id.* at 387. The dissenters noted, however, that § 1404(a) considerations were also important in choosing New York as a forum. *Id.* at 388. "If New York is a convenient district for Leesona for arbitration regardless of where the other disputants are located and also for a Section 1404(a) transfer, it certainly is convenient for pretrial purposes of this action."

63. Levy, *Complex and Multidistrict Litigation and the Federal Courts,* 40 FORDHAM L. REV. 41, 63 (1971). This issue is discussed thoroughly in C. WRIGHT, *supra* note 11, at § 3867.

64. *See, e.g., In re* Antibiotic Antitrust Actions, 333 F. Supp. 299 (S.D.N.Y. 1971), in which Judge Lord stated,

> The court is not considering the transfer of *one* case from one district to another, but rather the transfer and consolidation of 32 cases filed in twelve districts into one district for trial. Thus, instead of looking to the individual convenience of *each* party and *each* witness, the court must look to the overall convenience of all parties and all witnesses.

Id. at 304. *See also* Levy, *supra* note 63, wherein the author states,

> Since the transfers involved multiple cases, the rights, interests and convenience of the individual parties were swept aside in the drive toward apparent judicial economy. While there may be merit in effecting consolidation of some cases for determination of liability, it is regrettable that this has been done by sacrificing the rights of the individual parties and through judicial rewriting of section 1407.

ble practice, borne out by the history and experience of complex cases, then the statute itself should be amended to reflect this.[65] Professors Wright and Miller find "some merit to the argument that until that has been done the power of the transferee court should be limited to those matters that clearly fall within the language of, as well as the original policies underlying, [section] 1407."[66]

Finally, it has been suggested that section 1404(a) transfers cause "unnecessary delay and confusion," which are attributable to "inconsistent handling" of the motions by the transferor judges.[67]

Nevertheless, stronger reasons can be advanced in support of the practice of using section 1404(a) to consolidate section 1407 cases before the transferee judge for *all* purposes. Most multidistrict cases involve complex problems, such as patent or antitrust matters,[68] in which the transferee judge, because of his pretrial management, has acquired a desirable expertise.[69] Aside from the obvious judicial

---

65. *Id.* at 65. *See* notes 53-57 and accompanying text *supra.*

66. C. WRIGHT, *supra* note 11, at § 3866.

67. Note, *The Judicial Panel and the Conduct of Multidistrict Litigation,* 87 HARV. L. REV. 1001, 1019-1021 (1974).

68. In an informal survey based on the Appendix of the *Manual for Complex Litigation,* multidistrict cases breakdown approximately as follows:

Air Disaster	20%
Antitrust	30%
Securities	24%
Patent, Trademark & Copyright	10%
Common Disaster	2.5%
Products Liability	1.5%
Contracts	2.5%
Employment Practices	3.5%
Miscellaneous	6%

Manual for Complex Litigation (1977 ed.). The significance of the manual is discussed in C. WRIGHT, *supra* note 11, at § 3868. *See also* Comment, *Observations on the Manual for Complex and Multidistrict Litigation,* 68 MICH. L. REV. 303 (1969).

This complexity factor in patent cases was discussed by the Court in Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 330-32 (1971).

69. Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971). The Second Circuit refused to set aside Judge Lord's § 1404(a) transfer of all the actions before him to Minnesota. The Panel had transferred the cases to the Southern District of New York for consolidated pretrial proceedings pursuant to § 1407. After the majority of cases was settled, Judge Lord was designated by Chief Justice Burger, pursuant to 28 U.S.C. § 292, which provides,

> The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit judge of the circuit wherein the need arises.

The non-settling cases were then assigned to Judge Lord under § 1407(b). In denying the petition for rehearing on denial of a writ of mandamus the Second Circuit stated,

> He [Judge Lord] also indicated that he felt because of the complexity of these cases the interests of judicial efficiency make it highly desirable that the judge who conducted the pretrial proceedings continue as trial judge, and that it would be impossible for him to remain in the Southern District of New York for the length of time these trials were expected to take. . . . Judge Lord's solution appears fully justified under the circumstances.

447 F.2d at 125.

economy reasons for consolidating the trial on the merits, there is also the problem of inconsistent decisions in cases in which defensive collateral estoppel may not be applied.[70] Consolidation for all purposes avoids this problem and thus promotes " 'just and efficient conduct' of the actions transferred."[71]

Moreover, moving for a section 1404(a) transfer while a section 1407 transfer is impending has the potential of causing great confusion through the "inconsistent handling" of the section 1404(a) motions by transferor judges. This situation should be avoided or a tremendous waste of judicial resources may occur. Parties should refrain from making a section 1404(a) motion under these circumstances particularly in light of the district courts' inclination to rule on section 1404(a) motions without regard to pending section 1407 motions before the Panel.[72]

Since section 1407 does not require the transferee judge to be located in a place where all the cases might have been brought,[73] the transferee judge may not always be able to transfer the action to himself for trial on the merits. When he is not in a district where proper venue lies for all cases, there is a possible alternative to a section 1404(a) transfer. Pursuant to 28 U.S.C. section 292,[74] a transferee judge could be assigned to a district where venue is proper. Although transfer by the Panel to such a judge may not be common practice,[75] the solution is viable and is especially preferable when the designated judge has acquired expertise in handling the litigation.

The major problem with either the transferee judge transferring the case to himself or the Panel transfering the case to a designated judge is that transfer is still limited to a forum where all the cases could have originally been brought. It has been suggested that if no single forum can be found, it would be preferable to transfer all the cases to a limited number of districts for coordinated pretrial and

---

70. The court in *In re* Antibiotic Antitrust Actions, 333 F. Supp. 299 (S.D.N.Y. 1971), indirectly recognized this problem.

> The defendants have consistently and energetically contended that these cases and the classes of plaintiffs involved are inherently unmanageable. The court has already held that the class actions may be managed and it now notes that these complex, overlapping and sometimes conflicting cases can be *effectively* tried only if they are transferred to one court and one judge. Attempting to try these cases in any other manner would be like trying to assemble a jigsaw puzzle with some pieces missing.

Id. at 305-06. *See also In re* Suess Patent Infringement Litigation, 331 F. Supp. 549, 550 (J.P.M.D.L. 1971).

71. H.R. No. 1130, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS, 1898, 1901. *See* Speyer, *Multidistrict Litigation in Air Crash Cases*, CASE & COMMENT (July-Aug. 1974).

72. *See* Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1017 (1974), which discusses this inclination and its ramifications in greater detail.

73. *See* notes 49-52 and accompanying text *supra.*

74. (1976) *See* note 69 *supra.*

75. Recently, the Panel has had a tendency to transfer under § 1407 to a judge in a jurisdiction where a § 1404(a) transfer is appropriate. *See* Part III(B), *supra.*

trial proceedings.[76] This procedure may have insurmountable shortcomings if the parties do not cooperate in the effort.[77]

Returning to a model one plaintiff-multiple defendant case, if a patent holder sues all the potential infringers on his patent, it is possible that no proper forum for all cases may be found to litigate the common issues. The patent infringers are likely to oppose consolidation on the merits since under the recent trend in collateral estoppel decisions, they may adopt a "wait and see" approach. Meanwhile, if the patent holder wins, he would be denied the use of collateral estoppel because of due process considerations. Such piecemeal decision-making advances neither the policies behind the use of collateral estoppel, nor the need for consolidation in some complex litigation situations. An application of the principles expressed in the *Parklane* decision may be the key to avoiding this difficult problem in the future.

IV. Policy Considerations for Denying the Use of the Collateral Estoppel Defense in Certain Complex Multidistrict Cases

A. Proposed Limitations on the Abandonment of the Mutuality Doctrine

Justice Traynor's language in *Bernhard* aside,[78] the foregoing discussion indicates that there should be some limitations placed on the erosion of the mutuality doctrine. While partial abrogation of the doctrine is certainly justified, "in certain instances the element of fairness seems clear in not allowing the potential litigant to sit on the sidelines in the first action knowing he can reap the fruits of victory without taking the consequences of defeat."[79]

These "elements of fairness" and considerations of judicial economy run through the Court's analysis in both *Blonder-Tongue*[80] and *Parklane.*[81] The Court's citation to the *Restatement (Second) of Judgments,* which generally equates offensive and defensive collateral estoppel,[82] underlines the necessity of analyzing defensive collateral estoppel under the same format that the Court in *Parklane*

76. *Manual for Complex Litigation* (1977 ed.) § 5.22.

77. The problem arises if parties request separate hearings in each district in which the cases are pending. Federal Rule 77(b) provides in part "No hearing, other than one *ex parte,* shall be conducted outside the district without the consent of all parties affected thereby." Rule 77(b), F.R.C.P.

78. *See* notes 17-20 and accompanying text *supra.*

79. Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties,* 68 COLUM. L. REV. 1457 (1968).

80. *See* 402 U.S. at 323, and the discussion at notes 20-28 and accompanying text *supra.*

81. *See* 99 S. Ct. at 651-56 and the discussion at notes 29-38 and accompanying text *supra.*

82. 99 S. Ct. at 651 n.16.

used to analyze the policies for applying offensive collateral estoppel.[83] Professor Semmel's suggestion with regard to the mutuality requirement is appropriate for both offensive and defensive collateral estoppel:

> Abandonment of mutuality alone is a half-hearted step toward judicial economy. It may actually detract from what is certainly the most desirable end result, the adjudication in one lawsuit of all disputes concerning the rights and obligations of all persons who have a judicially recognized interest in the transaction giving rise to the litigation.[84]

What both the Court and Professor Semmel have recognized is that allowing non-parties to an action to wait to see whether a common opponent loses in the present litigation, with the hope of defensively asserting collateral estoppel in a subsequent action, has a profoundly negative effect on the important principles of judicial economy and fairness. Thus, in his Proposed Rule 2, Professor Semmel would not allow a non-party to assert collateral estoppel in a subsequent action if he could have consolidated in the first action.[85] This rule would do away with the gaming approach that otherwise prevails, and would give greater predictability to the application of the law. Additionally, although the Proposed Rule might sometimes make a non-party accept an inconvenient forum, it would "not take the choice away from the plaintiff; [it would] merely prevent him from having his cake (choice of forum or parties) and eating it as well (use of judgment in another action to which he has chosen not to be a party for tactical reasons)."[86]

B. Application of the Mutuality Doctrine in Multidistrict Litigation

In the complex multidistrict litigation setting, there are strong policy reasons why a court should not allow the defense of collateral estoppel to be used in a case where a section 1404(a) transfer would be desirable, but no proper forum exists to which all the cases could be transferred. Permitting defendants in a one plaintiff-multiple de-

---

83. *See* Part IV(B) *infra.*

84. Semmel, *supra* note 79, at 1472. Indeed, the Court in *Parklane* stated that this "wait and see" attitude would cause an increase in litigation and may be unfair in certain circumstances. 99 S. Ct. at 649.

85. Rule 2

> [A] person not a party to a lawsuit (Action 1) but (a) who may have become a party thereto but failed to attempt to do so or (b) who may have consolidated an action in which he was a party with Action 1 but failed to attempt to do so or (c) who became party on his own initiative to an action commenced after trial or final disposition of Action 1 on a claim arising prior to the trial or disposition thereof and such second action might have been consolidated with Action 1 had it been commenced prior to the trial or disposition of Action 1, may not assert any judgment in the first action against any party to both the actions if such non-party knew or had reason to know of the existence of Action 1.

Semmel, *supra* note 79, at 1475.

86. *Id.* at 1479.

fendant case to "wait and see" is contrary to the policy reasons that support the section 1404(a) transfer,[87] and frustrates the principles the Court in *Parklane* saw as central to the use of the collateral estoppel doctrine.

The Court in *Parklane* focused first on the need to preclude plaintiffs from litigating identical issues twice, and from adopting a " 'wait and see attitude' " in the hope that the first action will result in a favorable judgment.[88] Ideally, use of the defensive collateral estoppel doctrine tends to lessen litigation.[89] In a multidistrict case in which a section 1404(a) transfer is improper, a court allowing defensive use of the doctrine is actually encouraging the defendants to "wait and see." Even though consolidation for trial is preferable, defendants will "sit on the sidelines" rather than joining the litigation by filing declaratory judgment actions that would permit one court to dispose of all the cases. This not only undermines the strong policies of reduction of litigation and judicial economy cited by the *Parklane* Court, but also frustrates the policy reasons that support the section 1407 judge hearing certain complex multidistrict cases on the merits.[90] By adopting a policy that refuses to allow defensive collateral estoppel when mutuality is lacking and consolidation is preferable, a court would help implement the judicial economy policy central to both doctrines.[91]

A further consideration that mitigates against allowing collateral estoppel in such a situation is that it would be unfair to allow the waiting non-party to adopt a gaming approach to litigation, and it would not " 'promote the just and efficient conduct' of the actions transferred" contemplated by the passage of section 1407.[92]

Finally, there is the equally important concern of potentially inconsistent decisions. Both the use of collateral estoppel and the policies underlying section 1407 contemplate the elimination of inconsistency.[93] Allowing defensive use of collateral estoppel by a non-party in one plaintiff-multiple defendant complex litigation increases the potential for inconsistency, since the non-parties may take advantage of collateral estoppel if the litigation terminates fa-

87. *See* Part III(C) *supra.*

88. 99 S. Ct. at 651.

89. *Id.*

90. These reasons include the ability "to try the cases effectively and expeditiously," C. WRIGHT, *supra* note 11, at § 3866, and the desirability of having a trial judge with expertise controlling the complex action, *see* notes 68-70 and accompanying text *supra.*

91. *See* Note, *The Judicial Panel and the Conduct of Multidistrict Litigation,* 87 HARV. L. REV. 1001, 1021 (1974); notes 29-31 and accompanying text *supra*; and Part III(B) *supra.*

92. H.R. No. 1130, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1898, 1901.

93. In Hoag v. New Jersey, 356 U.S. 464, 470 (1957) Justice Harlan, speaking for the Court, stated, "As an aspect of the broader doctrine of *res judicata,* collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation." *See* notes 71-72 and accompanying text *supra.*

vorably, but may relitigate the question if the opposition prevails in the action in which they have not joined.

As discussed above,[94] requiring parties to consolidate in the first action in order to take advantage of collateral estoppel may have the effect of causing parties to litigate in inconvenient forums. Yet, an approach that puts both parties on equal footing is preferable to one that allows a non-party two or more bites at the same apple. Non-parties would still be free not to join in the action, but under this approach, they would not benefit from their reluctance at the expense of participating parties.

C. Some Procedural Considerations

Presumably, under section 1407 a transferee judge has control over all pretrial proceedings.[95] An order striking or denying the use of an affirmative defense such as collateral estoppel would appear to be within the power of the transferee court.[96] Indeed, it is preferable for the transferee judge to make such a ruling, for he is in the best position to determine the fairness of such a limitation.[97] In addition, a ruling by the transferee judge will alleviate any uncertainty or inconsistency that may arise if decisions are made by the various transferor courts on remand.[98] Notice and a hearing should be given to the affected non-parties.[99] Then, if it is found necessary, a preclusion order should be entered promptly,[100] which will allow the non-parties quickly to join in the action if they so choose, and avoid unnecessary prejudice.

---

94. *See* notes 85-86 and accompanying text *supra.*

95. *In re* Plumbing Fixture Cases, 298 F. Supp. 484 (J.P.M.D.L. 1968). Here, the Panel clearly stated that the transferee court had co-extensive power with that of the transferor court. *Id.* at 496. "[T]he transferee court may make any order to render any judgment that might have been rendered by the transferor court in the absence of transfer." *Id.* at 495. *See also* Levy, *supra* note 63, at 58.

96. *Cf. In re* CBS Licensing Antitrust Litigation, 1971 Trade Cas ¶73,447 at 89,847 (J.P.M.D.L. 1971); Allegheny Airlines Inc. v. LeMay, 448 F.2d 1341 (7th Cir.), *cert. denied*, 404 U.S. 1001 (1971), discussed in Levy, *supra* note 63, at 61 n.121.

97. Semmel, *supra* note 79, at 1478.

98. The confusion and possible inconsistency of encouraging the varying transferor courts to make such a ruling on remand is self-evident.

99. Semmel, *supra* note 79, at 1478.

100. Such a procedure was recently utilized in the complex antitrust action *In re* Yarn Processing Patent Validity Litigation, 472 F. Supp. 180 (J.P.M.D.L. 1979). The Honorable C. Clyde Atkins, Chief Judge of the Southern District of Florida, sitting as a §1407 transferee judge, entered a preclusion order against several alleged patent infringers. Several other defendants had filed declaratory judgment actions before Judge Atkins, but because of the § 1404(a) transfer problem discussed in this article, the court could not properly consolidate all the potential infringers in one trial on the issue of purgation of the patent misuse found by the Fifth Circuit. Citing the basic policy reasons underlying the use of collateral estoppel and the § 1404(a) transfer provisions, Judge Atkins ruled that the defense of collateral estoppel could not be asserted by the potential infringers who refused either to file declaratory actions before him, or to be bound by the result of the trial after the cases were remanded. Consequently, several of the defendants stipulated that they would be bound by the result of the trial on the issue whether the patent misuse should be purged.

If this procedure is found to be inappropriate by a transferee judge, a court could effectively withhold remand and achieve a similar result. While the Panel alone has the power to remand under section 1407(a),[101] it has frequently shown great deference to the transferee judge's recommendation.[102] By recommending that remand be withheld, both the parties and the transferor judge will be aware that, in the transferee judge's opinion, this is an instance when collateral estoppel is not a proper defense. This procedure may thereby facilitate the filing of declaratory judgment actions[103] by non-parties when venue is proper before the transferee judge.

If venue is not proper for filing declaratory actions before the transferee judge in his home district, it is suggested that the actions should be filed in a district where proper venue lies, and a 28 U.S.C. section 292[104] appointment be used to facilitate the same result. If and when the Panel remands the cases thereafter, the transferor court should defer to the transferee court's ruling or finding of the inappropriateness of the collateral estoppel defense. This has been the general practice of the transferor courts in multidistrict litigation cases,[105] and has been condoned by the Panel.[106]

Finally, these procedures seem appropriate in light of the Panel's policy of transferring cases under section 1407 to a district appropriate for a section 1404(a) transfer;[107] in the more than ten years of the Panel's existence, nearly ninety-five percent of the section 1407 actions have been terminated in the transferee court in some manner.[108] On more than one occasion, the Panel has specifically mentioned the significance of collateral estoppel considerations

---

101. *Rules of Procedure of the Judicial Panel on Multidistrict Litigation,* R.11.

102. *In re* Evergreen Valley Project Litigation, 435 F. Supp. 923 (J.P.M.D.L. 1977); *In re* IBM Peripheral EDP Devices Antitrust Litigation, 407 F. Supp. 254 (J.P.M.D.L. 1976); *In re* Franklin Nat'l Bank Secs. Litigation, 407 F. Supp. 248 (J.P.M.D.L. 1976); *In re* Multidistrict Civil Actions Involving the Air Crash Disaster Near Dayton, Ohio, 386 F. Supp. 908 (J.P.M.D.L. 1967).

103. This was the procedure used in *In re* Yarn Processing Patent Validity Litigation, 472 F. Supp. 180 (J.P.M.D.L. 1979), discussed at note 100, *supra*. Even though there is another adequate remedy or another pending suit, use of a declaratory judgment is not barred. The test is one of effectiveness and efficiency, and is largely within the court's discretion. 28 U.S.C. §§ 2201, 2202 (1976); Rule 57 F.R.C.P. *See* C. WRIGHT & A. MILLER, 10 FEDERAL PRACTICE AND PROCEDURE: CIVIL § 275 (1973). The non-participants may also choose to stipulate to the result, rather than to afford the expense of additional litigation. This allows the same benefits in many cases as the declaratory actions.

104. *See* note 69 *supra,* and notes 73-75 and accompanying text *supra.*

105. Levy, *supra* note 63, at 58; *cf. In re* Penn Central Secs. Litigation, 62 F.R.D. 181, 187 (E.D. Pa. 1974) (transferee judge should avoid conflict by requiring parties to comply with previous orders of the transferor judge).

106. *In re* Franklin Nat'l Bank Secs. Litigation, 393 F. Supp. 1093 (J.P.M.D.L. 1975). This point is discussed extensively in C. WRIGHT, *supra* note 11, at § 3866.

107. *See* the discussion at notes 58-62 and accompanying text *supra.*

108. Note, *The Judicial Panel and the Conduct of Multidistrict Litigation,* 87 HARV. L. REV. 1001, 1017 n.78 (1974); Cahn, *A Look at the Judicial Panel on Multidistrict Litigation,* 72 F.R.D. 211 (1976).

under *Blonder-Tongue.*[109] In one case,[110] for example, where a patent holder sought to relitigate the validity of his patent after it had already been declared invalid in a previous proceeding, the Panel transferred the cases to a judge who did not have any of the actions presently before him. The Panel reasoned that only this judge could "conclusively determine the patent validity and collateral estoppel issue,"[111] as well as eliminate "duplicative proceedings and the risk of inconsistent decisions."[112]

V. Conclusion

The *Parklane* case, by implication, has a great effect on the doctrine of defensive collateral estoppel in multidistrict litigation. The policy reasons presented by the Supreme Court give a strong basis for either a transferee or transferor court to deny the use of collateral estoppel when consolidation is preferable and no section 1404(a) transfer is possible to a forum where all the cases "might have been brought." A court must use its discretion wisely in deciding if consolidation on the merits is preferable. Nevertheless, in those cases in which a judge would normally transfer the cases to himself, and proper venue is lacking, collateral estoppel should be denied defendants in order to encourage the filing of declaratory actions.

Permitting defendants to "wait and see" undermines the policy reasons of judicial economy and fair and consistent results that underlie both the argument for section 1404(a) transfer by section 1407 judges to themselves, and the doctrine of collateral estoppel. That Congress has been delinquent in amending section 1407 should not be sufficient to restrain a court from using this device to achieve speedy and efficient disposition of complex multidistrict litigation.

109. *See In re* Yarn Processing Patent Litigation, 341 F. Supp. 376 (J.P.M.D.L. 1972), discussed at notes 58-62 and accompanying text *supra*; *In re* Suess Patent Infringement Litigation, 331 F. Supp. 549 (J.P.M.D.L. 1971).

110. *In re* Suess Patent Infringement Litigation, 331 F. Supp. 549 (J.P.M.D.L. 1971).

111. *Id.* at 550.

112. *Id.*